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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

PATRICK MARK DeMASI,
RANDALL THOMAS MEHLOW, and
RICHARD CHARLES ELLINGTON,

PETITIONERS,

-vs-

PEOPLE OF THE STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the removal of marijuana from a police department evidence locker, which marijuana was seized in an unrelated case, and which removal constitutes an apparent violation of state law and later delivery and sale of this marijuana by an undercover officer to the defendants and their subsequent arrest for possession of that marijuana constitute a denial of basic due process under the Fifth and Fourteenth Amendments to the United States Constitution such as to justify dismissal of charges against the defendants?

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EXHIBIT "A"
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EXHIBIT "B"
Modification of Opinion of May 24, 1982

EXHIBIT "C"
Order of the Supreme Court of the State of California denying Petition for Hearing before that court.

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OPINION BELOW

Following entry of guilty pleas in the Superior Court of the State of California, the conviction of the three petitioners was reversed by the California Court of Appeal, Fourth Appellate District, Division One, in an opinion issued on December 24, 1981. The State of California's request for rehearing was granted and on May 24, 1982, the Court of Appeal, Fourth Appellate District, Division One, filed an opinion affirming the judgment of conviction with a dissenting opinion (Exhibit "A"). On June 8, 1982, factual modifications in the opinion were made (Exhibit "B"). On August 4, 1982, the Supreme Court of the State of California en banc denied petitioners' request for a hearing with Justice Broussard voting in favor of granting a hearing. (Exhibit "C").

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

RELATED PARTIES AND CASES

By way of information filed by the District Attorney of San Diego County on May 25, 1979, petitioners Patrick Mark DeMasi, Randall Thomas Mehlow and Richard Charles Ellington were charged with various narcotics violations in violation of California state law. Following denial of various motions filed on behalf of defendants, guilty pleas to possession of marijuana for sale were entered by petitioners DeMasi and Mehlow (California Health and Safety Code Section 11359). Petitioner Ellington pled guilty to possession of a controlled substance (California Health and Safety Code Section 11357(a)).

In a two to one decision by the Court of Appeal on December 24, 1981, the convic-

tions were reversed. Following the granting of a rehearing, the Court of Appeal affirmed the convictions in a two to one decision filed on May 24, 1982. With one justice dissenting, the California Supreme Court denied their petition for hearing.

STATEMENT OF THE CASE

In late February of 1979, Officer Donald Berstler of the National City Police Department, on assignment to the San Diego County Narcotics Task Force, contacted petitioner Patrick DeMasi. He had been given information from another source that he could purchase cocaine from DeMasi. Berstler's initial contacts with both DeMasi and petitioner Mehlow to purchase cocaine were unsuccessful. On March 13, 1979, DeMasi stated he would not or could not supply any cocaine. Petitioner Mehlow told Berstler in one telephone conversation he was planning on leaving the state and suggested Berstler

not call him anymore regarding the purchase of narcotics. Berstler stated he contacted DeMasi and/or Mehlow six to ten times to request the purchase of controlled substances.

On March 13, 1979, Berstler again requested DeMasi obtain cocaine for him. DeMasi told Berstler he was unable to do so but asked Berstler if he (Berstler) could provide him and others with pound quantities of marijuana. Berstler told DeMasi it might be able to be done and said it would cost approximately four hundred twenty-five dollars ($425.00) per pound. DeMasi expressed an interest in purchasing approximately seven to ten pounds of marijuana. Berstler then stated the price for an amount that large would be four hundred twenty dollars ($420.00) per pound. Berstler also stated they must provide him with some cocaine or they would obtain no marijuana. The informant who had introduced Berstler to

petitioner DeMasi stated Berstler could obtain all the marijuana they wanted.

Between the time of this conversation and petitioners' arrest the following day, Agent Berstler removed from the National City Police Department evidence locker one pound of marijuana which was to be destroyed and had been seized in another unrelated case. On March 14, 1979, the three petitioners met Berstler at a shopping center in San Diego County. Petitioners DeMasi and Mehlow were in the front seat of the vehicle and petitioner Ellington in the rear. Discussion between Mehlow and Berstler took place after which a small sample (.9 grams) of cocaine was given to Berstler. The money for purchasing the marijuana was shown and the marijuana given to petitioners. In Berstler's presence, a sample of the marijuana was examined and smoked. Petitioner Mehlow gave Berstler four hundred

twenty dollars ($420.00) for the one pound sample. The petitioners were then arrested.

ARGUMENT

THE AGENT'S REMOVAL OF MARIJUANA FROM THE POLICE EVIDENCE LOCKER IN VIOLATION OF STATE LAW, SALE TO THE DEFENDANTS, AND ENCOURAGEMENT OF ITS USE, CONSTITUTES A VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Investigating Officer's Conduct was in Clear Violation of California State Law.

A reading of California Health and Safety Code Sections 11474 and 11474.5 evidences an intent that controlled substances seized by law enforcement officers not be used in a manner similar to that employed by the agent in the present case. The language of this section is quite clear and mandates:

> "All seizures under provisions of this chapter. . . shall, upon conviction of the owner or defendant, be ordered

> destroyed by the judge of the court in which the conviction was had and the judge shall turn all such evidence over to the Attorney General for destruction or disposition."[1] (Emphasis added.)

Section 11486 provides for similar disposition when the case has been disposed of by way of dismissal or otherwise than by way of conviction. This language is unambiguous and has been interpreted as mandatory by the California Supreme Court. People v. Backus, 23 Cal.App.3d 360, 384-385.

It is difficult to imagine a more blatant violation of the above sections than for the officer to remove the contraband from an evidence locker, place it in the possession of the defendants, and actually dispose of a portion of it by encouraging those same defendants to smoke a portion of that contraband provided. The actions

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[1] Section 11474 has been renumbered and is now embodied in Section 11473.5.

of the officer were clearly unauthorized.

B. The Conduct of the Agent in the Present Case was Outrageous to the Extent that Due Process Principles Bar the Government from Invoking Judicial Process to Obtain a Conviction.

The idea of excessive or outrageous police conduct as forming a bar to prosecution on due process grounds has been recognized by this Court in United States v. Russell, 411 U.S. 423, 431-432 [93 S.Ct. 1637]. In Russell, the decision in Sherman v. United States, 356 U.S. 369 [78 S.Ct. 819] was affirmed wherein excessive police conduct was viewed as equally offensive as coerced confessions and unlawful searches.

Since 1971, the Ninth Circuit Court of Appeals has recognized a defense based on outrageous law enforcement conduct which continues to be applicable. See United States v. Prairie, 572 F.2d 1316, 1319,

note 3 (9th Cir. 1978); Greene v. United States, 454 F.2d 785 (9th Cir. 1971). In Prairie, supra, it was noted that due process principles could still bar a criminal conviction where the government's conduct was sufficiently offensive.

The question here presented is whether the agent's conduct in removal of the marijuana from the evidence locker and encouragement of the defendants to consume a portion thereof, all in apparent violation of existing California state law, constitutes conduct so outrageous that due process principles should bar prosecution. Petitioners urge the question raised creates defects in the very institution of the prosecution. The majority of cases discussed in the opinions of the courts to this date have not involved the degree of police misconduct involved here. This conduct violates fundamental fairness and is ". . .[s]hocking to the

universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." United States v. Russell, supra, 411 U.S. 423, 431-432. In Russell, supra, the conduct of the undercover federal narcotics agent involved limited participation in a methamphetamine laboratory already in operation. In Hampton v. United States, supra, 425 U.S. 484, the government agent instigated the sale and supplied the contraband which the defendant then turned and sold to other undercover agents. The plurality opinion in Hampton held that even though the police involvement exceeded that in Russell, it was not a denial of due process because Hampton showed a pre-disposition to sell the contraband and, in fact, did engage in an independent act of sale to the second group of agents.

Police conduct which constitutes outrageous involvement for purposes of invoking

due process objections has generally been held in the federal courts to be one of degree. In evaluating whether government conduct is outrageous, the Court must consider the nature of the crime and the tools available to law enforcement agencies to combat it. United States v. Twigg, 588 F.2d 373, fn. 6 (3rd Cir. 1978).

An examination of the totality of circumstances in the present case, leads to the conclusion the investigating officer actually manufactured and created the charged offense. He was continually rebuffed in his attempts to induce two of the petitioners to sell him cocaine. He violated the law of California by taking the contraband to sell to the defendants, and he not only did in fact supply the marijuana but stood by while they smoked it. He no sooner put it in their hands when they were arrested for possession of that same marijuana for

sale.

This differs substantially from those federal cases in which the government supplies the contraband to a defendant who later, of his own volition, engages in a separate independent criminal act of selling the contraband to another government agent. In the present situation, no intervening free act took place -- the crime was completed upon delivery of the contraband to the defendants. As Chief Justice Warren observed in Sherman v. United States, supra, 356 U.S. 369, the function of law enforcement ". . . does not include the manufacturing of crime."

CONCLUSION

For the reasons stated herein, Petitioners DeMasi, Mehlow and Ellington respectfully request this Court grant the Writ

prayed for.

DATED: 27 September 1967

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